

November 12, 2002

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Re: Security Requirements for Motor Carriers Transporting Hazardous Materials –
Advance Notice of Proposed Rulemaking FMCSA-02-11650 (HM-232A)

Gentlemen:

The American Trucking Associations, Inc. (“ATA”) is pleased to submit comments in response to the Research and Special Programs Administration’s (“RSPA”) and Federal Motor Carrier Safety Administration’s (“FMCSA”) Advance Notice of Proposed Rulemaking (“ANPRM”) referenced above. ATA is the trade association representing the American trucking industry.¹ As the national representative of the trucking industry, ATA is vitally interested in matters affecting the nation’s trucking fleet, including the implementation of security requirements affecting the transportation of hazardous materials. For this reason, ATA is submitting these comments on the ANPRM.

ATA supports the Department of Transportation’s (“DOT”) goal of ensuring the security of hazardous materials transportation and its decision to solicit input from the regulated community on the feasibility of using certain existing technologies to

¹ ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.

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accomplish this goal. We remained concerned, however, that the proposed measures can be easily defeated and could compromise our ability to transport large amounts of hazardous materials in an efficient, cost-effective manner. Because the transportation of hazardous materials often represents less than 5% of revenues for large trucking companies, the likely result of implementing these measures could be a mass exodus from the business of transporting hazardous materials. This will result in a reduction in competition among carriers willing to transport hazardous materials and a concomitant increase in the price charged for such transportation.

The ANPRM requests comments on the feasibility following topics: (1) pre-notification; (2) escorts; (3) vehicle tracking; (4) anti-theft devices; (5) operational measures; and (6) safe havens. We first address some preliminary issues and then address each of the issues set forth in the ANPRM, below.

A. Preliminary Issues.

(1) Type of Material(s) to be Covered by Additional Security Measures.

As a preliminary matter, it is important to recognize that although there are more than 800,000 domestic shipments of hazardous materials each day, only a small percentage of these would be attractive targets for a terrorist.² We believe that any additional security regulations should focus only upon the small percentage of hazardous materials that could easily be converted into a weapon of mass destruction (hereinafter “highly hazardous materials”). In that regard, it is important to examine not only the hazard class but also the specific material and the quantity being transported.

Since September 11, 2001, various government officials have talked about the possibility of subjecting transporters of radioactive materials, explosives, flammable materials, and poison gases, to additional security measures. We offer the following examples to illustrate the importance of looking beyond the hazard class in determining which materials should be subject to additional controls.

(a) While spent nuclear fuel is an example of a substance that warrants additional controls, not every shipment of radioactive material is a potential terrorist target. Indeed, the majority of radioactive materials are relatively innocuous medical diagnostic materials that pose no security threat even though they may be placarded as class 7 radioactive materials.

(b) Similarly, certain shipments of explosives could pose an attractive terrorist target; however, many explosives are not shipped in sufficient quantities nor have sufficient strength to be used as a weapon of mass destruction. It is important to

² Although we are unable to quantify the number of hazardous material shipments that can be readily converted into a weapon of mass destruction, we assume that a terrorist would not be interested in hijacking or sabotaging shipments of paint, cleaning materials, or other regulated materials that comprise the majority of hazardous materials transported over the road.

recognize these distinctions before imposing additional expensive controls in the name of enhancing security.

(c) In the context of poison by inhalation gasses, it is important to focus not only upon the toxicity of the substance, but also the quantity of the material being transported. Bulk transportation of certain poison by inhalation materials presents security concerns that are not present for non-bulk packages (*e.g.*, cylinders) of the same material.

(2) Ongoing Technology Evaluation.

On September 6, 2002, the DOT launched a study to measure the effectiveness of certain security technologies and procedures for safeguarding hazardous materials being transported by trucks. The study is a joint public/private partnership between DOT, the Battelle Memorial Institute, the American Transportation Research Institute, the Commercial Vehicle Safety Alliance, Total Security Services, Inc., Qualcomm, Inc., and several motor carriers and technology vendors.³ The federal government has allocated \$2.5 million to the study and the private sector participants are providing an equivalent amount of resources.

The study is designed to independently assess which combination of technology and procedures is the safest and most cost-effective for protecting different types of hazardous cargo from being hijacked by terrorists. The study will include more than 100 trucks equipped with a variety of existing technologies and examine several representative hazardous materials transportation scenarios. Preliminary findings are expected in December 2003. We believe that any proposed rule on the subject matter addressed in this ANPRM should be a logical outgrowth of the conclusions reached during this study. Accordingly, DOT should not develop a proposed rule on this subject until the study's conclusions are published and analyzed.

(3) Cost Issues.

Many of the suggested technologies and operating changes presented in the ANPRM would be prohibitively expensive to implement. The trucking industry is a very competitive industry. Most companies operate on a profit margin of less than 2 percent and would be unable to implement the technologies or operational changes without financial assistance.

ATA surveyed its members in connection with preparing these comments to the ANPRM. Many motor carriers indicated that they simply would refuse to haul hazardous materials if they were forced to bear the costs associated with the installation of some of the technologies listed in the ANPRM.

³ The American Transportation Research Institute is a 501(c)(3) not for profit research foundation that is affiliated with the American Trucking Associations. Total Security Services, Inc. is an independent security firm that provides anti-terrorism consulting services to the American Trucking Associations and other clients.

It is important to realize that most hazardous materials transporters have absorbed the costs associated with the provision of additional security training to their drivers and dispatchers. Many companies have gone even further and have secured their facilities, created corporate identification cards, and enacted other security measures with no outside financial assistance. This is not the case for other transportation modes. If the trucking industry is required to implement expensive security technologies, then financial assistance in the form of grants or tax credits would be necessary and the Department of Transportation should be an advocate for such assistance.

Since September 11th, 2001, the airline industry has received more than a billion dollars in financial assistance to help secure that industry. For example, airlines received \$100 million in FY 2002, and are likely to receive \$150 million in FY 2003, to harden cockpit doors against unauthorized entry.⁴ Airports were allocated nearly \$750 million to make modifications to accommodate mandated security equipment and screening in FY 2002, with an additional \$247 million to be provided in FY 2003.⁵ Similarly, the ports have earmarked \$150 million for security grants in FY 2003, which we understand is available to individual ports to assist in their security programs and systems.⁶

We believe that any technology mandates required for the transportation of hazardous materials by motor carriers should be funded through tax credits and/or federal grants.

(4) Additional Security Measures Must be Commensurate with Risk.

The risk or vulnerability of hazardous materials in transportation differs depending upon the operational conditions of each motor carrier. In order to avoid over spending on security enhancements that may never be needed, it is important to recognize that a one-size fits all approach is inappropriate. For example, security measures that may be deemed appropriate for truckload carriers could be inappropriate in the less-than-truckload environment and even less appropriate when applied to companies that limit their operations to small package deliveries.⁷ Similarly, security measures that may be appropriate for long distance operations may be ineffective in an urban environment or in cases where a truck operates within a limited geographic area.

⁴ United States House of Representatives, Appropriations Committee, Department of Transportation and Related Agencies Appropriations Bill, 2003, H.R. 2299, House Rpt.107-722 (10/1/2002).

⁵ *Id.*

⁶ *Id.*

⁷ We use the phrase “truckload” to define the quantity of freight required to fill a truck – usually in excess of 10,000 pounds. We use the phrase “less than truckload” to represent the quantity of freight less than that required for the application of a truckload rate – usually less than 10,000 pounds and generally involving the use of terminal facilities to break down and consolidate shipments. See Transport Topics Press, *American Trucking Trends 2002*, pp. 81, 83 (2001).

We also believe that any additional security measures should be tied to the Office of Homeland Security's Homeland Security Advisory System ("HSAS"). The HSAS is a color-coded system that characterizes the threat of a terrorist incident in the United States. Certain measures that may be necessary when there is a high risk of a terrorist attack (*i.e.*, threat conditions orange or red) would be an inefficient, expensive waste of resources under a lower threat condition (*i.e.*, threat conditions green, blue, or yellow). Other measures may be appropriate during or immediately following a terrorist attack, but would be inappropriate at other times. In addition, any additional security requirements that are imposed during the higher level threat conditions must be based upon the specific nature of the threat, including the mode of transportation, the specific types of cargo, and the geographic region implicated by the threat. For example, if intelligence information indicates that the reason for elevating the HSAS condition to Orange (*i.e.*, High) is based upon a threat that is specific to aviation, then only those segments of hazardous materials trucking that serve the aviation community should be required to engage in the additional security precautions.

B. Pre-notification of Routes.

The ANPRM requested comment on the concept of notifying state and/or local authorities prior to the transportation of certain materials through their jurisdictions, with respect to the route planned for the shipment and the time of day during which the shipment will occur. As discussed below, this measure would compromise security. The pre-notification measure also would require the allocation of large amounts of administrative resources and likely would become an unmanageable burden for motor carriers, the federal government and local law enforcement.

In examining the usefulness of the pre-notification requirement, the first question that must be resolved is "what would be done with the information?" The rationale used to support the creation of a pre-notification system was stated in the ANPRM:

Pre-notification enables emergency responders in jurisdictions through which such shipments take place to prepare in advance for a potential emergency or accident. It also enables state or local authorities to restrict traffic or take other precautions along the affected route.⁸

We find it difficult to accept that local law enforcement will alter their preparedness training based upon notifications of the types of materials that may be present within their jurisdiction at any given time. Preparation of emergency response facilities and training of emergency responders takes place over a long period of time and is generally keyed to hazard class rather than specific hazardous material. It would be impracticable to alter such training programs or reallocate equipment purchases and strategic deployment to respond to a "daily" notification of a particular type of hazardous material that will be

⁸ ANPRM at 46623/2.

traversing the local jurisdiction—and to expect that all these changes would be made based upon the remote probability that such transportation will result in a release of hazardous materials.

The overwhelming volume of information that would be broadcasted could render the information useless to emergency responders. Who will process this information? Can it be processed in a timely manner? Will the information be put to good use? From a financial resources perspective, state and local budgets have been stretched to the limit. It is unlikely that emergency response providers have the personnel or computer resources necessary to manage the volume of information they would be receiving under a pre-notification system.⁹ Indeed, DOT's report on a centralized hazardous materials database concluded that "a user at the local level may be overwhelmed with information concerning hazardous materials flow through the community."¹⁰ Few, if any, emergency response providers would be able to receive, process, and use this information in a timely manner. As a result, such information is likely to be ignored in all but the largest jurisdictions.

One of the stated purposes of the ANPRM is to enhance the secure transportation of hazardous materials. We do not believe that there will be an enhanced security benefit from this requirement, *** **TEXT REDACTED** ***.

The trucking industry also has concerns with how the administration of such a pre-notification system would affect its existing operations. A pre-notification system would require drivers, dispatchers, and managers to assume additional responsibilities and likely would create a need to hire additional administrative personnel to process the necessary paperwork. Some trips would require a carrier to notify literally hundreds of local jurisdictions. Indeed, the RSPA 2002 Study of the centralized database concept concluded that centralized data collection is likely to be burdensome to those required to submit data.¹¹

Many carriers receive less than one hour notice before being required to pick up freight. Often the carrier has no prior notice concerning the type of cargo they will be picking up. How will this information be processed in a timely manner? Other operational concerns include the method by which road detours and other route changes would be handled. Finally, many manufacturers have come to rely on "just in time" delivery to limit the expense of managing large inventories of raw materials. If pre-notifications result in a delay in freight transportation, the supply chain will be adversely

⁹ *** **TEXT REDACTED** ***.

¹⁰ U.S. Department of Transportation, Research and Special Programs Administration, "A Study of Hazards and Risks to Public Health and Safety, the Environment, and the Economy Associated with the Transportation of Hazardous Materials," Final Report p. 67 (June 18, 2002) (hereinafter "RSPA 2002 Study").

¹¹ RSPA 2002 Study at 67.

impacted. The recent marine port closures have clearly demonstrated the negative causal effects of supply-chain delays to the economy.

In conclusion, we believe that a hazardous materials pre-notification system will increase the cost of hazardous materials transportation, diminish transportation efficiencies, overwhelm local resources, and increase the vulnerabilities of hazardous materials transportation. With no demonstrable cost/benefit relationship and the certainty of diminishing security as a consequence, pre-notification should not be considered in either the near or intermediate term.

C. Vehicle Escorts.

The ANPRM requests comment on the use of armed escorts, either on the vehicle or in an accompanying vehicle. We assume for purposes of these comments that such an extraordinary measure would be limited to bulk quantities of “highly hazardous materials” that are attractive targets for terrorists. Notwithstanding the limited use of these escorts, such a requirement would require the creation of a new security escort industry and create significant problems for the trucking industry.

Trucking companies are not in the business of providing professional, armed, security services and would have to look to a third party to provide such services. The cost of doing so may be prohibitive. Indeed, several companies responded to ATA’s survey on the escort issue by stating that the costs associated with the provision of escorts would be so high that they would not transport any material that required an escort.¹² This could create a significant problem for the transportation of such “highly hazardous materials.”

In addition to the direct costs incident to the provision of armed escorts, the additional indirect costs also would be prohibitive. These costs would include dramatically higher insurance premiums that would flow from the potential liability of using armed escorts and the use of additional vehicles and personnel.

Separate and distinct from the cost problems are the operational logistics associated with the use of armed escorts. Almost all states require a permit to carry a firearm. Trucks, however, travel interstate. Will the armed escorts be able to cross jurisdictional borders with their firearms? Will trucks now be required to stop at state borders in order to change escorts? *** **TEXT REDACTED** ***. The ATA has considerable experience in this area because several of its members haul arms, ammunition and explosives (AA&E) for the Department of Defense. Hazardous materials that require escorts would have to be prescheduled. This is a significant operational change from the manner in which these materials are transported today.

¹² *** **TEXT REDACTED** ***. Presently, the average rate for transporting freight is \$1.81 per mile. See Transport Topics Press, *American Trucking Trends 2002*, p. 27 (2001).

Many companies do not have regular routes; having a sufficient number of escorts prepared to deploy in numerous locations is very expensive and presents significant logistical challenges.

D. Vehicle Tracking.

The ANPRM references satellite tracking, direct short-range communications, and cell phones as technologies that enable motor carriers to monitor a shipment while en route to its destination and to identify deviations from prescribed routes or time frames. While many motor carriers utilize these technologies to maintain contact with their vehicles and increase their efficiency, many types of trucking applications are unable to benefit from the use of these technologies and have found their costs to outweigh their benefits. Many companies run defined schedules and routes with no economic justification for expensive tracking equipment. This explains why many regional motor carriers have not adopted the technologies for use in their operations. Several ATA members have indicated that the cost associated with vehicle tracking could not be justified and if faced with a vehicle tracking mandate, they would simply no longer transport hazardous materials.¹³

Transponders have been used in large trucking operations to assist with efficient routing and refueling; *** TEXT REDACTED ***. In fact, the FMCSA's Hijacking Brochure acknowledges that "[c]riminals know about electronic tracking systems and how to dismantle them."¹⁴ Security focus groups conducted with members of ATA in recent months confirm that this is indeed the case in actual operations.

The costs incident to the use of satellite tracking are high. *** TEXT REDACTED ***. In addition, motor carriers will have costs associated with maintenance and employee training. *** TEXT REDACTED ***. Furthermore, the myriad of existing tracking devices are based upon proprietary technology and are not interoperable.

Vehicle tracking to improve routing efficiency and vehicle tracking for security purposes are very different functions. The economic benefits associated with the use of satellite transponders in certain trucking applications are well understood; however, their security benefits are untested. *** TEXT REDACTED ***.

While certain types of operations, such as a large truckload carrier that operates over a wide geographic area, can benefit from transponder technologies, others cannot. *** TEXT REDACTED ***. This assumes that the terrorists would have properly

¹³ One member indicated that it is unable to dedicate equipment for hazardous materials transportation – faced with the prospect of having to equip all of its trucks, it would simply exit the hazardous materials transportation business.

¹⁴ http://www.fmcsa.dot.gov/pdfs/Hijacking_Brochure.pdf

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cased and rehearsed their operational scheme, which is very much the characteristic of major attacks.

Using cellular technology for vehicle tracking may be effective in many areas of the country; *** TEXT REDACTED ***.

If reliable communication between the truck and the driver is the goal when transporting certain highly hazardous materials, other methods of tracking are possible – using a combination of traditional technologies, cell phones, radios, periodic calls made from destinations along a route. Establishing performance standards that can be met through the use of several different technologies or changes in operational procedures are preferable to the mandate of specific technologies. Motor carriers are in the best position to determine the method or combination of technologies that would provide the most effective coverage of their vehicles and the decision concerning communication techniques and technologies should be left to the discretion of each individual trucking company.

E. Anti-theft Devices.

For many years, the trucking industry has been concerned with the problem of cargo theft. As a result, the industry is constantly looking for technologies and methods to reduce losses stemming from cargo thefts. The ANPRM requests comment on several anti-theft devices that can help reduce the risk of vehicle hijacking or cargo theft. Some of these devices would be prohibitively expensive to deploy, while others require additional evaluation to determine whether they are effective.

Devices such as remote vehicle shut-offs, electronic ignition locks, and driver verification systems utilizing security codes or biometric identifiers such as fingerprints are a limited deterrent and likely would not stop a professional thief or terrorist. *** TEXT REDACTED ***.

*** TEXT REDACTED ***.

Remote vehicle shut-off creates other issues that also must be evaluated. For example, the ability to turn off a truck traveling down a highway would entail a significant potential legal liability for the person making the decision to shutdown that truck. Although a system that is designed to gradually reduce the power output of the engine would be safer than a system that shuts off the engine or applies the brakes, even a gradual power takedown could cause an accident and a release of hazardous materials. *** TEXT REDACTED ***. Finally, it is at least conceivable that the *** TEXT REDACTED ***. While we recognize that this technology is constantly evolving, ATA's knowledge of the capabilities of current systems leads us to believe that in some circumstances this feature could lead to an increase in risk. *** TEXT REDACTED ***.

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With respect to the use of tamper-evident seals, *** TEXT REDACTED ***. The industry has been using tamper evident seals for years. One problem that has arisen from the use of seals is law enforcement's refusal to sign documentation indicating that they have broken the seal for inspection purposes. ATA is currently working with the Commercial Motor Vehicle Safety Alliance to develop new procedures to ameliorate this situation. *** TEXT REDACTED ***.¹⁵

Many ATA members would support a regulation that requires motor carriers to lock the truck and trailer when the truck is unattended and carrying certain hazardous materials that would be an attractive terrorist target. Indeed, most ATA members already have implemented this simple security measure.

The trucking industry has much to gain from the development of cost effective security measures, which would ameliorate some of the losses it must bear from cargo theft. We fully support the investigation and development of such technologies; however, for the reasons stated herein, we strongly oppose any technology mandate.

F. Operational Measures.

The ANPRM states that "some motor carriers are employing two drivers or using driver relays to avoid en route stops on long trips."¹⁶ The ANPRM goes on to suggest that employing two drivers or using driver relays to avoid en route stops are "cost effective ways to enhance hazardous materials transportation security."¹⁷ This is not true. In almost every case, single drivers are utilized for trips that can be completed in less than 10 hours.

While some motor carriers do use driver relays, such operational practices are used to increase the range that each truck can travel without running afoul of the hours of service regulations.¹⁸ Dual drivers, however, are very expensive, and when this additional service is provided for Department of Defense operations, a significant and necessary assessorial charge is applicable. Several ATA members estimated that dual drivers would increase the cost of transporting the hazardous material by 25%. In addition, the use of dual drivers doubles the company's liability exposure in the case of an accident. The use of dual drivers also may necessitate the conversion of a company's fleet to include trucks with sleeper berths, a very expensive proposition. Finally, requiring dual drivers would exacerbate driver shortages, a significant problem for the trucking industry.

¹⁵ *** TEXT REDACTED ***.

¹⁶ ANPRM at 46623/3.

¹⁷ *Id.*

¹⁸ If the second driver is "on-duty" for security reasons, then they would be "on-duty" for purposes of complying with the hours of service regulations.

Many companies surveyed by ATA indicated that they would elect not to transport hazardous materials subject to the dual driver requirement.

G. Safe Havens.

The final item addressed in the ANPRM is the expansion of safe havens. Safe havens are secure areas where hazardous materials could be left unattended. Most ATA members support the concept of increasing the number of safe havens that they can access; however, they remain skeptical that these facilities can be provided. Several members noted that the number of truck parking spaces is inadequate; how will the government create safe havens that comply with the security requirements currently mandated by the Military Traffic Management Command (“MTMC”)? Where will they be located? Is security enhanced by concentrating large quantities of highly hazardous materials in one location? Who will provide the security? One member suggests that the government provide monetary incentives to truck stops that modify their facilities to qualify as a safe haven. The use of existing infrastructure could limit the cost of expanding the safe haven system. For example, should the standard for safe havens mirror MTMC’s safe haven requirements, there would be very few locations in the country that would be capable of providing an adequate perimeter (*e.g.*, 300 to 2,000 feet) around a facility. In addition, the cost of providing a nationwide network of such facilities would entail complicated zoning hearings, likely citizen protests and numerous legal challenges.

CONCLUSION

In responding to the events of September 11th, we must not compromise our ability to move large amounts of hazardous materials in an efficient, cost-effective manner. Introducing inefficiencies to our freight transportation system helps further the terrorists’ goals of disrupting the American way of life. Any decision on technology to enhance the secure transportation of hazardous materials should be timed in a manner to take advantage of the ongoing research project described in Section A.2, *supra*.

If you have any questions concerning the issues raised in these comments, please contact the undersigned at (703) 838-1910.

Respectfully submitted,

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